Condemnation of Part of the Duration of an Interest—Just Compensation

The Federal Government possesses the power of eminent domain, but its exercise is sharply limited by the Fifth Amendment: ". . . nor shall private property be taken for public use, without just compensation." The meaning to be given to the term "property" bears directly upon the determination of the elements to be considered in fixing just compensation. At times the word is used to indicate a tangible object. In the case of real property, if it is held to be the equivalent of the tangible, land, compensation need be made only when that is taken, and need be equal only to its value.

Since it is only in a possessory sense that land can be said to be "taken" by the power of eminent domain, and since a lease gives the right to possession, a leasehold falls within the definition of property. A lessee is entitled to share in the award when all or a part of the property leased is taken by eminent domain during the term of the lease.[1] In such cases the fair market value of the property is to be ascertained as in a single ownership, after which the amount awarded may be divided among the interested parties according to the value of their interests.[2] The condemnor cannot by settling with the owner deprive the lessee of his right to have the value of his leasehold judicially ascertained.[3] Of course, the lease itself may contain a provision which controls the rights of the parties in the event of the condemnation of the leased premises.[4]

Following the rule of compensation for market value, used when the interest taken is the fee,[5] the federal courts have held that compensation to the lessee is to be measured by the market value of the lease, its fair rental value.[6]

The hardship thus placed on the tenant has not escaped notice. Market value has been called an unsatisfactory test of the value of a leasehold interest, for it seldom has any market value.[7] In

[1] Duckett & Co. v. United States, 266 U.S. 149 (1924); Kohl v. United States, 91 U.S. 367 (1875).

[2] Carlock v. United States, 53 F. 2d 926 (App. D.C. 1931).

[3] Duckett & Co. v. United States, 266 U.S. 149 (1924)

[4] United States v. 8286 Square Feet of Space, 61 F Supp. 737 (D. Md. 1945); United States v. 10,620 Square Feet, 62 F. Supp. 115 (S.D.N.Y. 1945). *But cf.* United States v. 150.29 Acres of Land, 152 F 2d 33 (C.C.A. 7th 1945).

[5] Olson v. United States, 292 U.S. 246, 256 (1933); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 81 (1912), ORGEL, VALUATION UNDER EMINENT DOMAIN 56 (1936).

[6] Gershon Bros. Co. v. United States, 284 Fed. 849 (C.C.A. 5th 1922).

[7] Metropolitan West Side Elevated Ry. v. Siegel, 161 Ill. 638, 44 N.E. 276

another sense—more properly—property denotes not only a tangible thing, but an aggregation of interests of which a thing is the subject matter. In this conception, the lessee should be additionally compensated for interferences with the legal relations that constitute his property. Some state courts have rejected the standard of market value and allowed the tenant to recover for his removal costs.[8] The right of which the tenant is deprived and for which he should be compensated is the right to remain in undisturbed possession to the end of the term. The value of that right cannot be measured by the rental value of the lease. Only by allowing him the expense of securing a new place for his business is he justly compensated.

Refusal to consider such "consequential damages" in determining compensation produced harsh results, but the federal courts consistently denied their recovery by the lessee.[9] Consequential damages were not allowed in one case on the theory that the lessee had constructive notice that he might be deprived of the use of his premises by eminent domain.[10] Other theories have been advanced for their denial.[11] One is that since the lessee would have to bear these removal costs at the expiration of his term, the condemnation merely changes the date at which they are incurred. Another is that removal costs are arbitrary and speculative; that the lessee might move to a distant point prompted by whim or caprice.

These theories seem to ignore the idea that compensation should be equal to the condemnee's loss. The lessee who has installed equipment intends that it will be used there for at least the full term of the lease. Interference with this use before the end of the term forms the basis for his right to compensation for its removal. The condemnee is extremely unlikely to move his equipment a great distance in order to increase the amount of the award in an attempt to "get even" with the government for condemning his property. His sole interest is in getting his business in operation again—quickly, at a good location. The issue to be resolved is whether the owner or the government (public) is to bear this cost.

A major step towards giving actual effect to the principle of

(1896); Des Moines Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924), McMillan Printing Co. v. Pittsburgh, C. & W Ry., 216 Pa. 504, 65 Atl. 1091 (1907), 2 LEWIS, EMINENT DOMAIN §§ 727, 728 (3d ed. 1909)

[8] Cases cited *supra*, note 7.

[9] United States v. 561 Brannan St., 55 F Supp. 667 (N.D. Cal. 1944); United States v. Certain Parcels of Land, 54 F Supp. 561 (S.D. Cal. 1944); United States v. Entire Fifth Floor, 54 F. Supp. 258 (S.D. N.Y. 1944); United States v. Improved Premises, 54 F. Supp. 469 (S.D. N.Y. 1944); Wm. Wrigley, Jr. Co. v. United States, 75 Ct. Cl. 569 (1932), Howard Co. v. United States, 81 Ct. Cl. 646 (1935).

[10] Gershon Bros. Co. v. United States, 284 Fed. 849, 850 (C.C.A. 5th 1922).

[11] See discussion in ORGEL, *op. cit. supra*, note 5, §§ 67, 68.

measuring the compensation by the amount of the condemnee's loss seems to have been taken by the Supreme Court in *United States v. General Motors Corporation.*[12] The Government instituted proceedings under the authority of the Second War Powers Act[13] to acquire a one year lease of a warehouse on which the defendant had a twenty year lease. Six years of the term were remaining. The trial court accepted the Government's theory that the compensation should be limited to the fair market rental value of the floor space condemned. Realizing that the rule worked an injustice and seeing an opportunity to distinguish the case because of its unusual facts, the circuit court reversed the decision.[14] It held that the defendant was entitled to prove, as an element of just compensation, the actual and necessary expense directly incurred in vacating the property condemned. The Supreme Court, while affirming, held that the removal costs should be considered as elements affecting the market value of the temporary occupancy, not as independent items of damages.[15] The Court reiterated the rule which forbids consideration of consequential losses when the fee or the lessee's entire interest is taken.[16]

This holding marked a departure from other eminent domain cases. One writer has criticized it as an invasion of the legislative prerogative.[17] He points out that Congress, in debating the proposed Second War Powers Act, rejected amendments which would have awarded consequential damages.[18]

The Court stated that the hardship to the condemnee is greater where only a part of his interest is taken. This is true, but it seems to be no basis for the disparity in results. Where the entire interest is taken, the Court is weighed down by a mass of precedents, since the temporary taking from a lessee was a case of first impression, it was free to set forth a more equitable rule.

The war effort greatly increased the Government's need for property. Temporary interests were acquired in most of the con-

[12] 323 U.S. 373 (1945), noted in 13 GEO. WASH. L. REV. 242 (1945); 39 ILL. L. REV. 420 (1945), 19 SO. CALIF. L. REV. 64 (1945); 23 TEX. L. REV. 402 (1945)

[13] 56 STAT. 177 (1942), 50 U.S.C. App. § 632 (Supp. 1945) This power was terminated Dec. 28, 1945. 59 STAT. 658 (1945), 50 U.S.C. App. § 632a (1946).

[14] "We agree with the lower court's characterization of the Government's theory as 'hard law'. We go further and express the view that it should not be accepted in the absence of definite and controlling authority." General Motors Corp. v. United States, 140 F 2d 873, 874 (C.C.A. 7th 1944); Comment, 22 N.C.L. REV. 325 (1944), Noted in 92 PA. L. REV. 453 (1944).

[15] United States v. General Motors Corp., 323 U.S. 373, 383 (1945).

[16] *Id.* at 379, 380.

[17] Dolan, *"Just Compensation" and the General Motors Case*, 31 VA. L. REV. 539, 542 (1945).

[18] 88 CONG. REC. 1649–54 (1942).

demnation proceedings. The space condemned was largely occupied by tenants. Occupants, forced to move promptly to other premises, asserted claims for the cost or damage occasioned by their moving. Heretofore these claims had been classified as consequential losses which the condemnee was to bear, but the *General Motors* decision gave them new hope and provided an impetus for their assertion.

As noted earlier,[19] many leases contain condemnation clauses. Tenants contended that such clauses did not apply when the Government did not take the fee, or that at least they were entitled to receive the cost of removing their equipment and getting established in new premises. The courts held that the tenants had contracted away any rights that they might otherwise have had and could not share in the award.[20]

In *United States v. Katz Drug Company*[21] the Government acquired a warehouse for a term which would expire fifteen months sooner than the company's lease. The company was forced to remove a large stock of merchandise very quickly, at extra cost. Also, it had to pay a bonus to lease another warehouse. It sought to have this bonus cost and the above-normal cost of moving considered in determining the amount of its award. The trial court refused to consider these costs, but allowed the company to recover for the remaining fifteen months of its term. It considered the practical effect of the taking was to destroy the entire term, for the cost of moving back after the Government left would be prohibitive and such a short term would have no market value.

The circuit court of appeals held unjustified the finding that the taking destroyed the unseized term of the lease. Although the company would not re-occupy the premises, the lease would still have a value to the company. However, the bonus cost and the above-normal moving cost should be considered in determining the market value of the temporary use taken. It would seem that under the *General Motors* ruling the company could have recovered the total cost of moving, but since it claimed only the above-normal cost, its recovery was restricted to that.

In *United States v. Petty Motor Co.* the circuit court of appeals felt that the principle of the *General Motors* case was not narrowly confined to the facts of that case, but controlled whenever the interest taken was less than a fee.[22] The Government had taken a leasehold interest until June 30, 1945, with the right to surrender possession on June 3, 1943 or 1944. The Petty Motor Company

[19] Cases cited *supra*, note 4.

[20] United States v. 21,815 Square Feet, 155 F. 2d 899 (C.C.A. 2d 1946); United States v. 10,620 Square Feet, 62 F Supp. 115 (S.D. N.Y. 1945); United States v. 45,000 Square Feet, 62 F. Supp. 121 (S.D. N.Y. 1945).

[21] 150 F 2d 681 (C.C.A. 8th 1945)

[22] 147 F 2d 912 (C.C.A. 10th 1945).

had a lease which expired October 31, 1943, with the right to renew for another year. The district court had considered the tenant's expense incurred in moving and re-installing its equipment, and the increased rents it was required to pay for other premises in determining the value of its right of occupancy. The judgment was affirmed.

This holding was reversed by the Supreme Court.[23] Since the shortening of the term was wholly at the Government's election, the longest limit would determine the extent of the taking. Thus the company's term would expire before the term taken by the Government. The court would not permit consideration of removal and relocation costs. The tenant's award should be the value of the use and occupancy of the leasehold for the remainder of the tenant's term less the agreed rent which the tenant would pay for such use and occupancy.[24] The *General Motors* case was distinguished on the ground that in the instant case the entire interest of the lessee was taken. In the former case the lessee had to return to the leasehold at the end of the Government's use or at least assume responsibility for that remainder. Actually in the *General Motors* case the Government's taking included a right of yearly renewal. By the exercise of its right of renewal the Government could have taken all of General Motor's term. But the Supreme Court looked upon the Government's tenure as one shorter in duration than that of the lessee.[25]

In the *Petty* case Mr. Justice Rutledge felt that the company's interest was only taken contingently.[26] He concurred in the result of the *Petty* case because the record did not show that the Government had exercised its option, but he stated:

> That ruling [U. S. v. General Motors] cannot be avoided by inverting the length of the term specified and, correlatively, the character of the option added.[27]

The *General Motors* case has been held inapplicable to another situation.[28] The Government acquired the right to temporary use and occupancy of the defendant's laundry. Defendant claimed that the Government had in effect taken its business as well as its

[23] 327 U.S. 372 (1946).

[24] *Id.* at 381.

[25] In a footnote to the *General Motors* case, 323 U.S. 373, 376, n. 4 (1945), the Court pointed out that the yearly right of renewal acquired by the Government was taken not to alter the question presented in the case.

[26] 327 U.S. 372, 381 (1946) (concurring opinion)

[27] *Id.* at 385.

[28] Kimball Laundry Co. v. United States, 166 F 2d 856 (C.C.A. 8th 1948), *cert. granted*, 69 Sup. Ct. 30 (1948). What change, if any, this portends is, of course, conjectural. It should be noted that the *General Motors* case reflects the opinions of but four of the Justices. Three did not participate and two dissented on the question of removal costs.

physical assets. It wanted the value of its trade routes and customers considered in determining its award. The court held that compensation was to be measured by the market rental or use value of the laundry during the Government's occupancy, plus the cost of restoring the plant and machinery to their condition at the time of the original taking.[29] The *General Motors* case had expressly stated that removal costs were to be distinguished from the value of good will or of injury to the business which must be excluded in determining market value,[30] so it was not controlling.

Thus the *General Motors* decision has been confined. It did not open the flood gates and permit the Government to be swamped by claims for consequential damages. Condemnees have not received swollen verdicts.[31] The principle evolved is just; a sound result is reached. Consideration of consequential damages must be granted if the owner is to be adequately compensated, but some damages may not be presently capable of accurate measurement.

The condition the property will be in when the Government terminates its use is uncertain. Normal wear and tear excepted, the condemnee has the right to have the property returned in its original condition. It is impossible to make any award for such speculative damages at the time of taking. It would be unjust to force the Government to pay for damages it had not caused and possibly might not. Although the condemnee may have suffered injustice in past proceedings, nothing desirable is to be gained by placing undue burdens on the Government. Purely speculative losses should not be considered, but a method should be used which would fully compensate the owner for his loss.

One solution was worked out in a case where the Government had acquired temporary use of some tracts of land during World War I. After determining the rental value, the court retained jurisdiction to assess damages if the Government failed to return the land in as good condition as when it took possession.[32]

Later cases held that condemnation proceedings were only to determine just compensation for the taking. Some courts held that they lacked the power to retain jurisdiction for the purpose of determining damage claims arising out of the Government's use of the property and that such claims would have to be presented in original action.[33] Should the Government move to dismiss the

[29] *Id.* at 860.

[30] 323 U.S. 373, 383 (1945)

[31] *See* Mr. Justice Douglas, concurring in part, *id.* at 384.

[32] *In re* Condemnation of Lands for Military Camp, 250 Fed. 314 (E.D. Ark. 1918).

[33] United States v. 16.747 Acres of Land, 50 F Supp. 389 (D. Del. 1943); United States v. 5.741 Acres of Land, 51 F Supp. 147 (E.D. N.Y. 1943); United States v. Improved Premises, 54 F. Supp. 469 (S.D. N.Y. 1944).

condemnation proceeding, it cannot be continued to enable the erstwhile condemnee to prove any damage done to the property.[34]

After the *General Motors* decision, the Government reversed its stand. The Department of Justice[35] announced that it desired damages caused by the Government's temporary occupancy to be determined in the condemnation proceeding. To prevent the awarding of purely conjectural damages, it instructed its attorneys to request the court to retain jurisdiction so that compensation for the Government's failure to properly restore the property would not be fixed until the property was returned to the condemnee.

This procedure has been followed. In a 1946 case,[36] the Government appropriated the temporary use of defendant's hotel. The award of compensation, agreed to by the parties, was to be full compensation except for any claims that might arise for damages caused by major structural changes. To make future awards, if the right to them arose and the parties failed to agree, the court retained plenary jurisdiction. After possession of the hotel was surrendered, the defendant petitioned for damages resulting from changes made to it. Referring to the Department of Justice bulletin heretofore noted,[37] the court held that it must carry out the express agreement of the litigants. These damages had been anticipated, but could not have been determined at the time of the original proceedings. Rather than relegate the defendant to another forum or force him to file an original action, the court would determine the further award.[38]

The option to renew the lease from year to year, acquired by the Government in most condemnations, presents another problem. It is certainly a property right taken from the condemnee, rendering uncertain the time when he may regain occupancy. In *United States v. Westinghouse Electric Corp.*,[39] the circuit court of appeals has recently ruled that the lessee's removal costs should be considered in determining the amount of compensation where the Government by exercising the option prolonged its occupancy beyond the term of the lease. The circuit court held that the *General Motors* decision was applicable to the situation presented.[40] The court, to strengthen its position, relied on the idea expressed by Mr. Justice Rutledge in the *Petty* case[41] that the *General Motors* ruling was applicable whenever the Government chopped up the

[34] United States v. Certain Parcel of Land, 51 F. Supp. 726 (E.D. N.Y. 1943).

[35] Department of Justice, Circular No. 3534, Bulletin No. 34, June 22, 1945.

[36] United States v. Certain Lands, 66 F. Supp. 572 (W.D. Mo. 1946).

[37] See note 35 *supra*.

[38] United States v. Certain Lands, *supra* note 12, at 575.

[39] 170 F. 2d 752 (C.C.A. 1st 1948).

[40] See note 25 *supra*.

[41] See note 27 *supra*.

lessee's interest. The holding seems sound. If these costs were not considered, the tenant would have to wait until its term expired, or the Government surrendered occupancy, before it could be certain that it would no longer be responsible under its lease. The injustice of denying the condemnee's costs is not as glaring as when a portion of its lease will definitely not be used by the Government, but the uncertainty here is wholly created by the Government. If it acquired a definite term when it originally took the use, no obstacle bars a later condemnation proceeding to acquire another term. The Government has the power to make certain what it has made uncertain and it should not complain when the award in the latter instance is based on somewhat speculative elements.[42]

A dissenting judge in the *Westinghouse* case pointed out that since the actual effect of the Government occupancy was to extinguish the entire term of the tenant, these consequential losses should not be considered.[43] He stated, however, that neither he nor his brethren had complete confidence in their inferences drawn from the two Supreme Court cases and that they would welcome a review of this matter by the Supreme Court.[44]

Following a strictly legalistic process of reasoning the Government could avoid liability for removal costs by taking a term longer than the tenant's, retaining the right to surrender earlier. Compensation would be based solely on the annual rental value. To prevent this procedure by the Government, the court could retain jurisdiction until the occupancy was actually terminated. Until then, removal costs would be held in abeyance. The majority in the *Westinghouse* case thought it significant that the Supreme Court has made no mention of this procedure.[45]

The *General Motors* decision appears to mean that the hard and fast rules of the past for determining compensation may be made the subject of a more critical examination. While they may not be overthrown or changed, at least they will be examined to see whether they produce harsh results. If they do, a standard should be adopted which more fully compensates the condemnee. The right to acquire property by condemnation is not questioned. But such a proceeding is a forced, not a voluntary, transaction. Use of the market value concept presupposes a willing seller, and he seldom exists in a condemnation proceeding. Many elements considered consequential under the market value concept would be considered in the price-fixing process in a voluntary sale.

Principles of law evolved during a century and a half of expan-

[42] *See* United States v. Certain Parcels of Land, 55 F Supp. 257, 265 (D. Md. 1944).

[43] 170 F 2d 752, 756 (C.C.A. 1st 1948) (dissenting opinion *per* Magruder, C.J.).

[44] *Id.* at 759.

[45] *Id.* at 756.

sion and development are not to be overthrown because instances arise where injustice occurs. Law has served its purpose—and served it well—when substantial justice is accomplished.

> The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner.[46]

In balancing these interests, actual losses to the condemnee, which are caused by the taking and are susceptible of fairly accurate pecuniary valuation, should be considered in determining the award. The award would then be closer to being an equivalent of just compensation.

Because these rules are well established, it may be that they should only be changed by Congress,[47] but an alternative method was recognized by Dean McCormick:

> Strong reasons of policy and fairness support the view that recompense for these losses should be specifically authorized by the Legislature, or should be sanctioned by the courts where the way is open, by the use of the concept, not of "market value," but of "value to the owner."[48]

Ralph N. Mahaffey

Recent Decisions

CONSTITUTIONAL LAW—DUE PROCESS—TAKING PROPERTY FOR PRIVATE USE

The assignee of a life insurance policy applied to defendant insurance company for a paid-up policy and a loan. Defendant refused, stating that consent of the assignor's wife was necessary, she having acquired an interest therein under the Pennsylvania Community Property Law, PA. STAT. ANN. tit. 48, § 201 et seq (1947). The last premium had been paid with funds received by the assignor after the effective date of the Law, consisting of the income from a trust, set up years previously, and income from stocks purchased in 1943. Assignee brought a bill in equity for a mandatory injunction. *Held*, injunction granted. The Community Property Law is unconstitutional in that it transfers one person's property to another without the owner's consent. *Wilcox v. Penn Mutual Life Ins. Co.*, 357 Pa. 581, 55 A. 2d 521 (1947).

Holding that the Community Property Law by purporting to transfer the right to one-half of the future income of the trusts and the stocks, in effect transferred previously vested rights, the

[46] United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 280 (1943).

[47] *See* Mr. Justice Douglas, concurring in part, United States v. General Motors Corp., 323 U.S. 373, 384 (1945).

[48] MCCORMICK, DAMAGES 542 (1935)

court said, "If an Act of assembly . . operates retroactively to take what is, by existing law, the property of one man, and transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Constitution, Article IX, Section 9, which declares that no man can be deprived of his . . property unless by . . the law of the land." This reasoning is grounded in the early American conception of a legally limited government. In 1792 a state court held that ". . . it was against common right, as well as against Magna Charta, to take away the freehold of one man and give it to another. . . ." *Bowman v. Middleton*, 1 Bay 252 (S.C. C.P. 1792). Constitutions of other states were held to preclude such a transfer. *Van Horne's Lessee v. Dorrance*, 2 Dall. 304 (U.S. 1795); *Hoke v. Henderson*, 15 N.C. 1 (1833); *Jones Heir v. Perry*, 10 Yerg. 58 (Tenn. 1836) Against this background recent wage, social security, and other social legislation strikes a sharp contrast, seemingly effecting what due process forbids—the transfer of property from one man to another. Thus, contributions required from workers and employers are put in a fund to pay unemployment benefits to other workers, with the possibility that the contributor may never receive any benefits therefrom. Is there a real conflict here, or may we justify the apparent difference by saying, "In the last analysis, nearly every law transfers something from *A* to *B*?" LUCE, LEGISLATIVE PROBLEMS (1935).

A person claiming the protection of due process must be able to show some actual damage. *Perry v. United States*, 294 U.S. 330 (1935). Even where damage can be shown, "An ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); *Block v. Hirsch*, 256 U.S. 135 (1921). Where the injury to property is more significant, indirectly benefitting others, the public interest in relation thereto may be so great as to justify the damage, as where cedar trees are destroyed to prevent damage to lucrative apple orchards, *Miller v. Schoene*, 276 U.S. 272 (1928), or where brick making in a residential area is prohibited, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). These suggest that, where the public interest is great, less protection can be expected from the due process limitation. Another factor is suggested in the statement that the ". . . destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense," *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); the implication being that where the taking is more direct, it will be prohibited or conditioned on compensation. Thus a statute prohibiting a coal company from mining its own property, in effect transferring a fee simple to the surface

owner, was declared unconstitutional. "The extent of the taking is great . . . [and] . . . the damage is not common or public." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). A railroad cannot be forced to allow another to use its land. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896). Production limits causing *A's* natural gas to flow to *B's* land are void as a transfer of property, there being no public purpose, such as the prevention of waste. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937). Thus, where significant damage is established, the elements to be weighed are:

1. The magnitude of a bona fide public interest, in relation to
2. The directness of the transfer.

An example of the cases upholding ostensibly confiscatory legislation is a decision upholding an order requiring a holding company to divest itself of its subsidiaries, the court saying, ". . . Congress balanced the various considerations and concluded that the right is clearly outweighed by the damage to the public. . . ." *North American Co. v. SEC* 327 U.S. 686 (1946). This seems in complete accord with the above principles, the public interest being great and the transfer indirect. This would apply to social legislation in general, expunging the alleged conflict between traditional due process and modern legislation.

Applying these principles to the *Wilcox* case, it would seem that the Pennsylvania court was warranted in its decision. There was no public purpose such as the protection of the public health, safety, or morals. The transfer was direct, the injury substantial. This case indicates that due process retains its historic role in forbidding arbitrary state action.

Jack R. Alton

CONSTITUTIONAL LAW—DOMESTIC RELATIONS—MISCEGENATION

Petitioners, a white female and negro male, were denied a certificate of registry and a license to marry by the County Clerk of the County of Los Angeles, California. Respondent invoked California Civil Code Section 69 (1941), which provides: ". . no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." CAL. CIV. CODE § 60 (1941). In proceeding in mandamus, *held*, California Civil Code Sections 60 and 69 are unconstitutional and the peremptory writ must issue. *Perez v. Lippold*, 198 P. 2d (Cal. 1948)

The Supreme Court of California based its decision principally on three grounds: 1. The statutes violate the equal protection of

the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone. 2. The statutes are too vague and uncertain to be enforceable regulations of fundamental right. 3. The right to marry is included in the constitutional guarantee of religious freedom which is encompassed in the concept of liberty in the Fourteenth Amendment and, therefore, in the absence of proof of a clear and present danger to public peace and order, such restrictive statutes are void.

Marriage is more than a civil contract; it is a basic civil right of free men. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The right to marry is included in the concept of liberty guaranteed by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). However, for many years the regulation of marriage has been recognized as a proper exercise of the state police power for the protection of health, safety, and general welfare. *Maynard v. Hill*, 125 U.S. 190 (1888). Bigamy and polygamy may be prohibited. *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1889). Premarital medical examinations for the determination and prevention of the spread of venereal diseases may be required. *Peterson v. Widule*, 157 Wis. 641, 147 N.W. 966 (1914).

Justice Traynor, writing for the majority, recognized the "rational nexus" test for classification in equal protection cases, *i.e.*, that classification for regulation under the state police power must bear a reasonable relation to a valid legislative objective. *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389 (1928); *Gulf, C.& S. F. Ry. v. Ellis*, 165 U.S. 150 (1897). But he perceived no sufficient factual basis for the racial distinction made in the statutes under consideration. Citing the works of numerous authors on biology, anthropology, psychology, and related fields, he concluded that there was neither the danger of physically or intellectually inferior progeny nor a probability of extreme social tension to merit the imposition of governmental restraint. Legislative classification or discrimination based on race alone is a denial of equal protection. *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1928); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The dissenting judge in the principal case would allow considerable legislative license in testing the equal protection contention. It must be noted that the number of writers who find physical degeneration, moral degradation, and public malcontent the result of interracial marriage is equally impressive. As a general rule, if any state of facts reasonably can be conceived which would sustain a law, the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 79 (1911). Nevertheless, when a fundamental personal

right, like marriage, is delimited, the advisability of requiring substantial proof of the validity of legislative classification according to races seems apparent.

Mr. Justice Edmonds placed his concurring opinion solely on the theory that the right to marry is grounded in the fundamental principles of Christianity which are guaranteed in the First Amendment, and which in turn are transmitted by the Fourteenth Amendment to the states. When a statute interferes with the liberties protected by the First Amendment, the prime consideration is whether or not there is any "clear and present danger" to the public justifying such legislation. *Craig v. Harney*, 331 U.S. 367 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The scope of the religious freedom provision has not as yet been clearly defined by the Court. The distribution of religious literature on public sidewalks is within its protection. *Marsh v. Alabama*, 326 U.S. 501 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). A person may refuse to serve as a juror because of his religious belief. *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943). However, the inclusion in the First Amendment of the right to marry an individual of one's choice merely because interracial marriages are recognized by the church to which petitioners belong may be an unwarranted extension of the original theory of religious freedom. See *Reynolds v. United States, supra.*

In addition to California, 29 other states have miscegenation statutes. 1 VERNIER, AMERICAN FAMILY LAWS 204 (1931). The courts, when presented with the question of the constitutionality of these laws, have upheld them without exception. When statutes treat each of the parties in the same manner and punish them to the same extent, they do not contravene the equal protection of the laws clause. *Stevens v. United States*, 146 F. 2d 120 (C.C.A. 10th 1944); *State v. Tutty*, 41 Fed. 753 (E.D. Ga. 1890); *Jackson v. Denver*, 109 Colo. 196, 124 P. 2d 240 (1942); *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739 (1877). Eight states, including Ohio, have removed similar restrictions by legislative action.

Although it has never decided the question in point, the Supreme Court did use the "equality of application" theory in upholding an Alabama statute which imposed a heavier penalty for the crimes of adultery and fornication when committed by a white person and a Negro than a similar statute imposed when the same acts were committed by people of the same race. *Pace v. Alabama*, 106 U.S. 583 (1882). However, last year, in declaring a racial restrictive covenant unconstitutional, the Court finally rejected this specious doctrine and announced that the purpose of the Fourteenth Amendment was to guarantee individual rights to all. "Equal protection of the laws is not achieved through the indiscriminate imposition of

inequalities." *Shelley v. Kraemer*, 92 L. Ed. 845, 856 (1948). This pronouncement seems to indicate that the final step in placing the colored man on a plane of absolute, individual equality with the white man may be the guarantee of the right to marry the person whom he chooses.

H. James Funkhouser

CONSTITUTIONAL LAW—POLICE POWER AND THE 14TH AMENDMENT

A number of morticians formed a life insurance company early in 1948 for the purpose of selling "burial" or a "pre-paid funeral" type life insurance. Agents for the new company were usually morticians or their employees. All but one of the stockholders of the new company were morticians. An act was passed in the state legislature making it unlawful for any life insurance company, its officers, agents, or employees, to own, operate or maintain a funeral or undertaking business; or contract or agree with any funeral or undertaking establishment to conduct the funeral of any person insured by such an insurance company, or for any funeral or undertaking establishment, its agents, officers, or employees to be licensed as agents, salesmen, or solicitors for any life insurance company doing business in this state. Act S.C. April 14, 1948, §§ 1–6, 45 St. at Large, p. — Plaintiffs sought an injunction in a federal three-judge court to enjoin enforcement of the statute on the grounds that it violated the due process and equal protection clauses of the Fourteenth Amendment. *Held*, injunction granted, the statute is unconstitutional. *Family Security Life Insurance Co. v. Daniel*, 79 F. Supp. 62, (E.D. S.C. 1948).

Police powers may be defined broadly as those powers of the state to pass legislation which relates to the safety, health, morals, and general welfare of the public. *Lochner v. New York*, 198 U.S. 45 (1905). It extends to the control of every action and event on part of its citizens having to do with public welfare. *Brents v. Stone*, 60 F. Supp. 82 (D.C. Ill. 1945). Insurance has long been regarded as a business affecting the public welfare. States may fix insurance rates, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1913); may regulate compensation of insurance agents, *O'Gorman and Young v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1930); and may drastically curtail the area of free contract in insurance contracts. *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71 (1922). Undertaking has also been held to be of public concern. *Walton v. Commonwealth*, 187 Va. 275, 46 S.E. 2d 373 (1948); *State v. Blackwell*, 196 S.C. 313, 13 S.E. 2d 433 (1941). However, ". . . a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose

unreasonable and unnecessary restrictions upon them." *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1923). *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) (A statute requiring all drug stores to be owned by licensed pharmacists is unreasonable and unnecessary).

In the principal case, the court, in holding the statute unconstitutional, went into its legislative history, giving consideration to the motives behind its enactment. It found that the statute was arbirary and capricious, that it was passed to destroy the plaintiff's businesses, and that it was not passed to protect the public interest.

The legislature of South Carolina in studying the social and economic facts affecting the public welfare apparently found evidence that the combination of the two businesses would present opportunities for certain business practices of an undesirable nature. Such an insurance-undertaker combination might discourage others from entering the field of undertaking. The commission rate to the agents on the insurance was markedly low but presumably this would be compensated for by the subsequent charge for the funeral.

An existing South Carolina statute (S.C. CODE ANN. § 7984 1942) forbids the payment of the principal of an insurance policy in services or merchandise. The undertaker-insurer due to his advantageous position would probably be able to secure many of his policyholders' funerals, thereby substantively circumventing this statute, inasmuch as he would be exchanging or indirectly substituting the funeral service for the principal of the insurance policy. The statute in controversy might have been an attempt to plug this loophole in the existing statute.

Could the legislature reasonably conclude that evil was present and that the state police power should be invoked to cope with it? The majority of the court thought not. In evaluating the majority decision it may be observed that the new life insurance-undertaking combination was less than one year old when this case was tried. During such a short period of time it is not likely that inherent evils in this combination would suddenly blossom into full maturity. However, court decisions seem to indicate that when the legislature reasonably determines that a danger to the public exists, the legislature need not postpone action until someone is victimized before it can protect the remainder of the public.

Judge Dobie, in the dissenting opinion, pointed out the broad police powers of the state in controlling businesses affecting the public welfare and that there is a presumption that statutes regulating such businesses are valid. Formerly the United States Supreme Court seemed willing to nullify police power statutes if there was substantial evidence of violation of the due process and equal protection clauses of the Fourteenth Amendment. The views

of Justices Holmes and Brandeis expressed in their many dissenting opinions indicated that the legislature should be given greater freedom in the exercise of such powers. The standard they adopted would require considerably more than substantial evidence of unconstitutionality to justify nullifying the work of the legislature. They adopted the standard that if no reasonable person trained in law could call the statute constitutional, then the statute should be nullified; in other cases the validity of the statute should be sustained. Judge Dobie observes that the present United States Supreme Court is following the views of Justices Holmes and Brandeis in this area of the law and, therefore, the statute in the principal case should be held constitutional.

L. Dennis Marlowe

EQUITY—BILL FOR DECLARATION OF OBSCENITY AGAINST NOVEL "FOREVER AMBER"

A petition was filed in equity by the Attorney General against the novel *Forever Amber* seeking a judicial declaration that the book was obscene, indecent, or impure. The action was brought under MASS. ANN. LAWS c. 272, §§ 28C–28G (Supp. 1948), which allows an action against the book itself and provides that a declaration of obscenity given under the above sections raises conclusive presumptions as to knowledge of obscenity under the criminal section, 28B. *Held,* that the novel *Forever Amber* is not obscene, indecent, or impure within the meaning of the statute. *Attorney General v. The Book Named Forever Amber,* 81 N.E. 2d 663 (Mass. 1948).

The statute was amended to its present form in 1945, with a minor change not material to the principal case in 1948. MASS. ANN. LAWS c. 272, § 28 (1948 Supp.). A similar procedure was suggested by Professor Chaffee in 1940. Chaffee, *Censorship of Plays and Books,* 1 BILL OF RIGHTS REVIEW 16, 21 (1940). The procedure was approved by BORCHARD, DECLARATORY JUDGMENTS 1035 (2d ed. 1941). However, both Chaffee and Borchard recognized possible constitutional problems of freedom of the press. See *Near v. Minnesota,* 283 U.S. 697 (1931).

In the principal case no mention is made of a constitutional question. It is probable that it was not pleaded by the parties and properly raised before the court. It is evident that the Attorney General would not seek to invalidate the statute, neither would the defendants as the act relieved booksellers and publishers from the risk of an adjudication of obscenity in a criminal action and from heeding the mandates of private censorship organizations. *Commonwealth v. Isenstadt,* 318 Mass. 543, 62 N.E. 2d 840 (1945). It has been sug-

gested that the large number of cases arising under the former criminal obscenity statute was due to the forceful efforts of Boston's Watch and Ward Society. *American Mercury, Inc., v. Chase,* 13 F. 2d 224 (D. Mass. 1926); Note, 40 ILL. L. REV. 421, n. 28 (1945). For a complete report of censorship in Massachusetts, see Grant and Angoff, *Massachusetts and Censorship,* 10 B. U. L. REV. 36–60, 147–194 (1930). The constitutionality of the former criminal statute was adjudicated and upheld, the court stating, ". . . the subject matter is well within one of the most obvious and necessary branches of the police power of the state." *Commonwealth v. Allison,* 227 Mass. 57, 116 N.E. 265 (1917).

Massachusetts has had an obscenity statute since 1711. See ANCIENT CHARTER, COLONY LAWS AND PROVINCE LAW OF MASS. BAY OF 1814. The substance of the act as amended in 1835 has been in effect until the present procedure was adopted. Since 1890 the statute has had two standards that would bring a book within its purview. "Whoever . . . sells a book . containing obscene, indecent, or impure language *or* manifestly tending to corrupt the morals of youth. . . ." ACTS OF 1890, c. 70.

In the first important case considered by the Massachusetts Supreme Judicial Court, no differentiation was made between the standards. *Commonwealth v. Buckley,* 200 Mass. 346, 86 N.E. 910 (1909). However, the case is significant because it is considered to have injected into Massachusetts law the Lord Cockburn test for obscenity Lord Cockburn stated as the test: ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall." *Regina v. Hicklin,* 3 Q.B. 360 (1868) The test was approved by subsequent decisions. *Commonwealth v. Allison, supra; Commonwealth v. Friede,* 271 Mass. 318, 171 N.E. 472 (1930). The evident scope of such a test led Judge Learned Hand to expressly repudiate it in a federal decision. *United States v. Levine,* 83 F. 2d 156 (C.C.A. 2d 1936). For ways in which obscenity questions may arise under federal statutes, see Note, 40 ILL. REV. 421 n. 27 (1945).

In 1930 the Supreme Judicial Court held on the authority of the *Buckley* case, *supra,* that the jury should consider only those parts of the book that are alleged to be obscene and not the book as a whole. *Commonwealth v. Friede, supra.* For criticism, see 37 W. VA. L. QUAR. 103 (1930). Later that year the legislature amended the statute. Where formerly it read, "Whoever . . . sells . . . a book containing obscene language . . .," it read after amendment, "Whoever . . . sells . . . a book . . . which is obscene. . . ." MASS. GEN. LAWS, c. 162 (1930).

It would seem that even if Lord Cockburn's test were still used,

the court would have more leeway in determining obscenity since the book would have to be considered as a whole. The alleged obscene material could be considered in its context and its interrelationship with other matter. In the first case arising under the amended statute, the book was considered as a whole but still found to be obscene. *Commonwealth v. Isenstadt, supra.* A distinction was drawn between the two standards noted above. The court found that the first standard, that the material was obscene, had been violated, thereby necessarily violating the second standard, corruption of the morals of youth. The court cited in a list of cases used for its test of obscenity *Regina v. Hicklin, supra,* but it stated as the test, ". . . the effect is to be found in the effect of the book upon its probable readers. . ." It would seem that this is a more narrow test than Lord Cockburn's, a test of the reaction upon the masses into whose hands the book will probably fall, not a test of the effect on those into whose hands the book may fall.

The principal case relies upon the *Isenstadt* case for all of its authority except for a procedural question. The court, while recognizing certain sections to be in bad taste and tending toward vulgarity, laid stress upon the lack of detail in the sexual episodes and in the overall tenor of the book, expressing the opinion that a reader would not envy the life of those present about Charles II but would feel only abhorrence. The effect of this one decision on the overall censorship pattern is doubtful. It is significant that the court found the book not to be obscene when, viewing its past attitude, it could easily have found otherwise.

It is believed that the ultimate determination of obscenity must rest in the discretion of the court despite such statements as made in the *Isenstadt* case, *supra,* ". . . it is not our function to assume a liberal attitude or a conservative attitude. As in other cases of statutory construction and application it is our plain but not necessarily easy duty to read the words of the statutes in the sense they were intended. . . ." If illiberality is reflected in the judicial decisions it is a reflection that the courts view the mores of contemporary society as a static rather than a dynamic concept.

Earl E. Stephenson

FEDERAL COURTS—JURISDICTION—POWER TO GRANT BAIL IN DEPORTATION PROCEEDINGS

An alien was arrested and held in custody without bail pending deportation proceedings. Before the hearing directed by the warrant could be held, he applied for a writ of habeas corpus on the grounds that the action of the Attorney General in denying bail was arbitrary and capricious and in contravention of petitioner's

rights under the Constitution. The District Court dismissed the writ on the grounds that the discretion of the Attorney General in refusing bail in such a case is not subject to review in the present proceedings. *Held*, reversing and remanding, that the decision of the Attorney General is subject to review and shall be reversed if found that bail was withheld arbitrarily. *United States* ex rel. *Potash v. District Director of Immigration and Naturalization at the Port of New York*, 169 F. 2d 747 (C.C.A. 2d 1948).

Statutory authority to grant bail pending final disposal of the case of any alien taken into custody was granted to the immigration officials in 1907. 34 STAT. 904 (1907) as amended, 8 U.S.C. § 156 (1946). The majority of the courts, including the Circuit Court of Appeals for the Second Circuit, have held the statute was not mandatory but gave a discretionary power to the official. *United States* ex rel. *Zapp v. District Director of Immigration*, 120 F. 2d 762 (C.C.A. 2d 1941). *Accord*: Ex parte *Perkov*, 45 F. Supp. 864 (S.D. Cal. 1942). *Contra: Prentis v. Manoogian*, 16 F. 2d 422 (C.C.A. 6th 1926).

There is no statutory authority for courts to grant bail in such cases. The power has been given, however, in criminal cases, REV. STAT. § 1015 (1878), 18 U.S.C. § 596 (1946), and in civil cases where the person is arrested on mesne process or execution issued from any court of the United States, REV. STAT. § 991 (1878), 28 U.S.C. § 844 (1946), but it has been held that neither applies to deportation proceedings. *United States* ex rel. *Carter v. Curran*, 297 Fed. 946, 951 (C.C.A. 2d 1924); 36 A.L.R. 877.

At common law the power to grant bail was inherent in the courts. *Queen v. Spilsbury*, 2 A.B. 615 (1898). Since the federal courts are courts of limited jurisdiction, deriving their power from statute, not the common law, BREWSTER, FEDERAL PROCEDURE § 23 (1940), some courts deny bail in deportation proceedings on the theory that the power to grant bail is not a mere matter of practice but is strictly dependent on statute. *Chin Wah v. Colwell*, 187 Fed. 592 (C.C.A. 9th 1911); *see Bongiovanni v. Ward*, 50 F. Supp. 3, 4 (D. Mass. 1943). Under this view, it is argued that the immigration official has the sole authority to fix bail and the decision is final. Ex parte *Perkov*, *supra*, at 867. Other federal courts have held that there is inherent power to admit to bail unless forbidden by statute. *Principe v. Ault*, 62 F. Supp. 279 (N.D. Ohio 1945); Note 19 So. CALIF. L. REV. 458; *see Whitfield v. Hanges*, 222 Fed. 745, 756 (C.C.A. 8th 1915). Other inherent powers have long been recognized in the federal courts, for example the power to punish for contempt, which in the words of one court ". . . was as much a part of the law of the United States as if ordained by a specific provision of a statute. . . ." In re *Neagle*, 39 Fed. 833, 857 (C.C.N.C.

Cal. 1889). If power to grant bail is inherent in the court, it may still be exercised as the 1907 statute did not purport to remove any of the court's power but merely reposed primary authority in the immigration officials. Thus the alien may seek bail from the immigration officials, and if refused apply to the courts.

Judicial review of administrative proceedings is of long standing and is based on the principle that the administrative process must be in accordance with the standard of due process of law. *The Japanese Immigration Case,* 189 U.S. 86 (1903). It is not limited to immigration cases. *Estep v. United States,* 327 U.S. 114 (1946) (selective service case). The general immigration laws make no provision for judicial review, but it has not been lacking, as the numerous cases in the reports of the Supreme Court and the lower federal courts testify. See VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 149 (1932). Some sections of the immigration acts expressly provide that the decision of the official shall be final. 39 STAT. 889 (1917), 8 U. S. C. § 155 (1946). But in the words of one court, ". . . this does not mean the courts cannot do anything about it." *United States* ex rel. *Trinler v. Carusi,* 166 F. 2d 457, 460 (C.C.A. 3d 1948). Some courts have reviewed the decisions of the immigration officials in denying bail, with no mention of the source of their power to do so. *Colyer v. Skeffington,* 265 Fed. 17 (D. Mass. 1920) ; *United States* ex rel. *Soannis v. Garfinkle,* 44 F Supp. 518 (W.D. Pa. 1942).

Where the power given to the official is discretionary the court review is limited to the issue of reasonableness. *United States* ex rel. *Georgian v. Uhl,* 271 Fed. 676 (C.C.A. 2d 1921). Thus, in the instant case, the decision of the Attorney General will be reversed only upon a clear showing that he acted without foundation. Therefore, there can be little weight to a claim that the courts are usurping the administrative functions by such review.

Whether the decision in the principal case is based upon the inherent power of a court to grant bail, or the concept that administrative proceedings are subject to review, the result is that such review, if not perfunctory, will act as a brake upon the possibility of arbitrary administrative action.

C. Stanley Taylor

LABOR LAW—FAIR LABOR STANDARDS ACT—COST-PLUS-FIXED-FEE CONTRACTOR

During World War II, plaintiffs were employees of a cost-plus-fixed-fee contractor. Some of the employees were engaged under one contract in the construction of a naval training camp and advance base depot; on another contract others were employed for

the maintenance and operation of the camp and base. Under the latter contract, materials and equipment purchased by the defendant were unloaded and later shipped to overseas destinations. Plaintiffs brought an action against the contractor for overtime pay, liquidated damages, and attorneys' fees under the Fair Labor Standards Act. 52 STAT. 1069 (1938), as amended, 29 U.S.C. § 216 (b) (1946). The Circuit Court held that the employees were not within the Act. On certiorari the Supreme Court dismissed the action of the construction workers, vacated the judgment as to the rest of the plaintiffs and remanded for further clarification of the facts. *Reed v. Murphey,* 168 F. 2d 257 (C.C.A. 5th 1948), *rev'd and remanded per curiam,* 93 L. Ed. 91 (1948).

To qualify under the Fair Labor Standards Act it is essential that the employee be ". . . engaged in commerce or in the production of goods for commerce." 52 STAT. 1062 (1938), as amended, 29 U.S.C. § 206 (a) (1946). The Act defines "commerce" as ". . trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof . . ."; "employer" as, ". . . any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States . . ."; "goods" as ". . . goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or any ingredient thereof, but does not include goods after their delivery into the actual possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 203 (b) (d) (i) (1946).

In the principal case, the circuit court stated, "There can be no commerce in war equipment. . . . Congress did not intend to include within its (the act's) coverage war activities of a government cost-plus-fixed-fee contractor involving no peacetime competition and no marketing of goods in commerce." *Reed v. Murphey, supra* at 262. In support of these propositions the court cited a similar case that was subsequently remanded for determination of the facts. *Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1947). It would appear that the constitutional power given to Congress to regulate commerce is not confined to commercial or business transactions but includes the transportation of persons and property no less than purchase, sale and exchange of commodities; goods may move in commerce though they never enter the field of commercial competition. *Bell v. Porter,* 159 F. 2d 117 (C.C.A. 7th 1947). Admitting that the transportation of materials from the base depot was an act of sovereignty, this alone would not exempt the defendant from complying with the provision of the Act. The sovereign, through

its Congress, had a right to include within the provisions of the act the transportation of articles by the sovereign itself. *Timberlake v. Day & Zimmerman, Inc.*, 49 F. Supp. 28 (S.D. Iowa 1943). Where an employer was engaged in production of guns and other vital war materials which were delivered to representatives of the Army and Navy at the employer's plant, subsequent transportation of the goods across state lines by the Government to its military facilities was "interstate commerce" within the Fair Labor Standards Act. *Burke v. Mesta Mach. Co.*, 79 F Supp. 588 (W.D. Pa. 1948).

Assuming that the activities of the defendant contractor were within the coverage of the Act, the individual plaintiffs still have the burden of proving that they, as distinguished from their employer, were engaged in commerce or production of goods for commerce, or that a substantial part of their activities was so closely related to commerce as to bring them within the Act. Work in original construction is usually said to be intrastate in character. *Parham v. Austin Co.*, 158 F 2d 566 (C.C.A. 5th 1946). However, some of the work under the maintenance and operation contract might satisfy the Act's requirements. Unloading of an interstate shipment is so closely related to interstate commerce that it may be an integral part of the interstate journey. *B. & O. Southwestern Ry. v. Burtch*, 263 U.S. 539 (1923); *Connell v. Vermilya-Brown Co.*, 164 F. 2d 924 (C.C.A. 2d 1947); *Clyde v. Broderick*, 144 F. 2d 348 (C.C.A. 10th 1944). Maintenance of buildings and equipment used in interstate commerce has been held to be within the purview of the Act. *Overstreet v. North Shore Co.*, 318 U.S. 125 (1942); *Walling v. Patton-Tulley Transp. Co.*, 134 F. 2d 945 (C.C.A. 6th 1943).

The emotional influence of wartime experiences which the Circuit Court exhibited in the principal case seems hardly justifiable in the light of current and proposed *peacetime* spending for national defense. The Fair Labor Standards Act was enacted with the broad purpose of raising substandard wages of certain members of the labor ranks and the Act may be extended to some of the present plaintiffs when the Supreme Court decides the case on the merits.

David W. Hart

QUASI-CONTRACTS—FAMILY RELATION DOCTRINE—UNENFORCEABLE ORAL CONTRACTS AS EVIDENCE

Plaintiff alleged an express oral contract with his father, who had promised to give an equal share of the profits of his lumber business to plaintiff and bequeath him the business by his will. In return, plaintiff promised to devote all his time to the lumber concern and relinquish his trucking business. The plaintiff performed

under the agreement for 11½ years until his father's death. Prior to, and during this time, the plaintiff lived apart from his father and supported a family of his own. The father having defaulted, the plaintiff sues the estate for the value of his services. The trial court gave judgment for the defendant on the pleadings. *Held*, reversed and cause remanded. While the express contract is not enforceable under the Statute of Frauds, plaintiff states a cause of action in quantum meruit. There is no presumption of gratuity inferred from the relation of these parties, since they are not members of the same household, and in any event, evidence of the express agreement rebuts the presumption. *Bemis v. Bemis*, 83 Ohio App. 93, 82 N.E. 2d 757 (1948).

In general, the existence of an express contract precludes quasi-contractual recovery of benefits conferred. *Walker v. Brown*, 28 Ill. 378 (1862); *Clendennen v. Paulsen*, 3 Mo. 230 (1833) But where the contract is unenforceable under the Statute of Frauds, and the plaintiff has no other remedy, he may recover in quantum meruit for the value of the services rendered. *Towsley v. Moore*, 30 Ohio St. 184 (1876); *Quirk v. Bank of Commerce*, 157 C.C.A. 130, 244 Fed. 682 (C.C.A. 6th 1917); *Hensley v. Hilton*, 191 Ind. 309, 131 N.E. 38 (1921); *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909). The statute does not preclude this remedy because it was not designed to prevent the recovery for benefits conferred. *Newbold v. Michael*, 110 Ohio St. 588, 144 N.E. 715 (1924); *Pancoast v. Eldridge*, 134 Okla. 247, 273 Pac. 255 (1928); RESTATEMENT, CONTRACTS § 355 (1932).

When the plaintiff shows he has conferred benefits on the defendant, who should have reasonably expected to pay for them, the law implies an obligation to pay. *Nutt v. Minor*, 14 How. 464 (U.S. 1852); In re *Talty*, 232 Iowa 280, 5 N.W 2d 584 (1942); *Towsley v. Moore, supra*; *Milliken v. Western Union Tel. Co.*, 110 N.Y. 403, 18 N.E. 251 (1888); WOODWARD, THE LAW OF QUASI-CONTRACTS 9 (1913). On the other hand, if the parties are in some proximity of family relationship, a presumption of gratuity is generally raised. The rationale of this rule is that persons connected by family ties ordinarily perform reciprocal services without expectation of payment. *Hinkle v. Sage*, 67 Ohio St. 256, 65 N.E. 999 (1902); *Scattergood v. Ingram*, 86 Ohio St. 76, 98 N.E. 923 (1912); *Merrick v. Ditzler*, 91 Ohio St. 256, 110 N.E. 993 (1915).

The term "family" does not accurately describe the relationship the courts have required to raise the presumption. In the present case, the presumption was not applied because the parties did not live in the same household, although they were closely related by blood. This limitation has been accepted by other courts. *Page v. Page*, 73 N.H. 305, 61 Atl. 356 (1905); *Kerr v. Wilson*, 284 Pa.

541, 131 Atl. 468 (1926). Conversely, the doctrine has been applied where the parties are not connected by blood or marriage, when they lived together in a household. *Anderson v. Houpt*, 43 Ohio App. 538, 184 N.E. 29 (1932). The conclusion suggested is that the relationship which raises the presumption of gratuity is one of household affinity rather than of blood or marriage. The rationale of reciprocal dependency supports this interpretation. *Cf.* Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L. J. 386 (1932).

In the present case, the court indicated that the plaintiff could introduce the express oral contract as evidence of the father's intention to pay, although it was unenforceable under the Statute of Frauds. In theory, an agreement such as this is both an oral *contract* and an oral *admission* against interest, and in the latter sense is evidence of a non-contractual obligation. *Moore v. Capewell Horse-Nail Co.*, 76 Mich. 606, 43 N.W. 644 (1889); WOODWARD, *op. cit. supra* at 163. Therefore, the policy of the statute is not violated when the evidence is admitted. *Clark v. Boltz*, 10 Ohio C.C. (N.S.) 51, 29 Ohio C.C. 665 (1908); *Zellner v. Wassman*, 184 Cal. 80, 193 Pac. 84 (1920); *McKeon v. Van Slyck*, 223 N.Y. 392, 119 N.E. 851 (1918); *Ellis v. Cary*, 74 Wis. 176, 42 N.W. 252 (1889).

The application of a presumption of gratuity would have increased the quantum of proof necessary to entitle the plaintiff to recover. But, the showing of an express promise such as alleged in the principal case is uniformly held to be sufficient to overcome the presumption. *Hinkle v. Sage, supra*, *Scattergood v. Ingram, supra*; *Merrick v. Ditzler, supra*; *Lemunyon v. Newcomb*, 120 Ohio St. 55, 155 N.E. 533 (1929). Thus, it seems that while the court properly refused to apply the presumption, this holding was unnecessary in order to sustain the plaintiff's pleadings.

Bryce W. Kendall

TORTS—CONSTRUCTION OF FEDERAL TORT CLAIMS ACT—SOLDIERS EXCLUDED AS A CLASS

Suit by injured soldier, and administrator of a deceased soldier, for damages resulting from personal injury and wrongful death in a collision between the private automobile in which soldiers were riding, while on furlough, and a negligently operated Army truck. The action was brought under the provisions of the Federal Tort Claims Act, 60 STAT. 842, 28 U.S.C. § 921 *et seq.* (1946). Judgment for plaintiffs in the District Court and the United States appeals. *Held*, judgment reversed; soldiers are given no right to sue the United States under the provisions of the Federal Tort Claims Act. *United States v. Brooks*, 169 F. 2d 840 (C.C.A. 4th 1948).

Before the Tucker Act, 24 STAT. 505 (1887), 28 U.S.C. § 41

(1946), Congress provided compensation for personal injuries or property damage caused by the negligence of employees of the United States through passage of private bills. To relieve itself of some of this legislative burden, the district courts were given jurisdiction by this Act over cases based on contract claims or claims founded on the Constitution, acts of Congress, or regulations of executive departments, not exceeding $10,000. This Act did not include cases sounding in tort.

Jurisdiction was later extended to tort liability in Admiralty cases where damages resulted from the operation of merchant vessels by the Government. 41 STAT. 525 (1920), 46 U.S.C. § 742 (1946). Jurisdiction in Admiralty was later extended to public vessels of the United States. 43 STAT. 1112 (1925), 46 U.S.C. § 781 (1946). Congress had previously granted jurisdiction to the district courts in certain types of suits for damages for infringement of patents by the Government. 36 STAT. 851, 35 U.S.C. § 68 (1910). The modern trend, among the English speaking nations, to abolish sovereign immunity to tort actions, together with the desire of Congress to free itself from the ever-increasing burden of considering special claim bills, prompted passage of the Federal Tort Claims Act, which was Title IV of the Legislative Reorganization Act, 60 STAT. 812–852 (1946) For the history of the administrative settlement of claims against the United States, see Walker, *Administrative Settlement of Claims under the Federal Tort Claims Act*, 9 OHIO ST. L. J. 445 (1948).

The courts have consistently held, in tort cases under the Public Vessels Act, *supra*, that Congress did not mean to relieve members of the naval forces from risks of injuries incidental to their service. Recovery was denied for the death of a naval officer killed in a collision at sea, while on active duty. *Dobson v. United States*, 27 F. 2d 807 (C.C.A. 2d 1928). Following this case, the same court later held that because of the compensation elsewhere provided for such persons, they must be deemed excluded from its [Public Vessels Act] protection. *Bradley v. United States*, 151 F. 2d 742 (C.C.A. 2d 1945) In like manner, under the Railroad Control Act of 1918, 40 STAT. 451 (1918), which provided Government operation of the railroads, it was held that a soldier injured by the negligent operation of a railroad had no valid action against the United States. *Saudoral v. Davis*, 288 Fed. 56 (C.C.A. 6th 1923). See *Dohn v. Davis*, 258 U.S. 421 (1922).

The common feature in these cases is the fact that the injuries occurred while the servicemen were on active duty Since Congress, in anticipation of injuries in line of duty, had provided a system of compensation and medical treatment, it seems reasonable that any further claims be excluded.

Section 410(a) of the Federal Tort Claims Act, *supra*, provides that:

> . the United States district court . . . shall have exclusive jurisdiction to . . . render judgment *on any claim* against the United States, for money only . . . under circumstances *where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death* in accordance with the law of the place where the act or omission occurred . . . the United States shall be liable . . . in the same manner, and *to the same extent as a private individual under like circumstances.* (Emphasis supplied.)

The 12 exceptions to the act are phrased with regard to the nature of the activity giving rise to the claim. Section 421 provides: "The provisions of this title shall not apply to . . . (j). Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

Among the acts of Congress repealed by the Federal Tort Claims Act, *supra*, was the Military Personnel Claims Act of July 3, 1943. 57 STAT. 372 (1943), as amended, 59 STAT. 225 (1945), 31 U.S.C. § 223b (1946). The Act contained this exception: ". . . the provisions of this act shall not be applicable to claims . . . of military personnel . . . for personal injury or death of such persons, if such . . . injury or death occurs *incident* to their service." (Emphasis supplied.) Thus Congress, in excluding the administrative settlement of claims of military personnel, did so on the basis of how and when they occurred and not on the basis of classes of claimants. The court, by its decision here, has provided this exception, holding that the maxim *expressio unius est exclusio alterius* is by no means a rule of statutory interpretation to be universally applied, and that since the exceptions are set out in terms of the nature of the activity giving rise to the claim, it is here inapplicable as to exceptions in terms of classes of claimants. See Leslie Anderson, *Tort and Implied Contract Liability of the Federal Government*, 30 MINN. L. REV. 133, 151 (1946)

Other courts in considering this aspect of the Military Tort Claims Act, *supra*, have distinguished between injury occurring as an incident of service and otherwise. In *Jefferson v. United States*, 74 F. Supp. 209 (D. Md. 1947), (*Motion to dismiss overruled*); 77 F. Supp. 706 (D. Md. 1948), heavily relied upon in the principal case, the court, while holding that a claim, arising out of an injury sustained in an operation negligently performed on a soldier while on active duty, was excluded from the provisions of the Act, implied that a distinction would exist in case of an injury received not incidental to service. The Government in that case took the position that the Military Claims Act, *supra*, ". . . is indicative of the general policy of Congress not to recognize claims by

military personnel for injuries occurring *incident to their service.*" (Emphasis supplied.)

In *Sampson v. United States*, 79 F. Supp. 406 (S.D.N.Y. 1947), the court appears to adopt a more logical approach, holding that the Act must be construed in the light of the law which it supplants, and, noting the repeal of the Military Personnel Claims Act, *supra*, denied the Government's motion to dismiss for lack of jurisdiction. *Alansky v. Northwest Airlines*, 77 F. Supp. 556 (D. Mont. 1948).

The exception read into the Act by the ruling of the principal case apparently places the active members of the Armed Forces in a unique class which is denied any rights under the Act. *Quaere.* Would a serviceman be denied the right to bring an action for the wrongful death of his wife, caused by the negligence of a Government employee or for damage to his private property by negligent Governmental employees? The answer from the express provisions of the Act seems clear, but for the holding of the principal case.

A. J. Prendergast, Jr.

TORTS—GUEST STATUTE—"IN OR UPON MOTOR VEHICLE" CONSTRUED

Defendant motorist had transported plaintiff to a social gathering. Before beginning the return trip, plaintiff entered the automobile but when defendant could not find her keys the plaintiff alighted from the car and stepped away from it about two feet. The defendant stepped on the starter with the result that the car moved backward for a short distance and stopped. In its movement, it struck and injured the plaintiff. At the trial, defendant moved for a directed verdict, relying on the Ohio guest statute. OHIO GEN. CODE § 6308–6 (1945). The trial court overruled this motion and the cause was submitted to the jury upon the theory of ordinary negligence. There was a verdict for the plaintiff and defendant appealed on questions of law. *Held*, judgment affirmed. The court said that the plaintiff was not "in or upon said motor vehicle" and was not a "guest" within the statute. *Eshelman v. Wilson*, 83 Ohio App. 393, 80 N.E. 2d 803 (1948).

The present case involves a construction of the Ohio guest statute, Ohio General Code Section 6308–6 (1945): "The operator . . . of a motor vehicle shall not be liable for loss or damage arising from injuries to . . . a guest, while being transported without payment therefor *in or upon said vehicle*, resulting from the operation thereof, unless such injuries . . . are caused by the wilful or wanton misconduct of such operator . . . of said motor vehicle." (Emphasis supplied.) The guest statute is in derogation of the common law and according to the general legal policy of construction it should

be strictly construed. *Miller v. Kyle*, 85 Ohio St. 186, 97 N.E. 372 (1911); *Kleybolte v. Buffon*, 89 Ohio St. 61, 105 N.E. 192 (1913); *Miller v. Fairley*, 141 Ohio St. 327, 48 N.E. 2d 217 (1943). Another rule of construction, perhaps more pertinent in the instant case, is that every word in a statute shall be given meaning, if possible. *Schraeder v. State*, 28 Ohio App. 248, 162 N.E. 647 (1928).

Defendant contended that the statute should not be limited to the requirement that the person transported be in or upon the vehicle. The defendant further claimed that the guest status should not be lost during the temporary interruption of a trip when the passenger is in a zone near to the vehicle. No case in point has heretofore been decided in Ohio. The language of the Ohio guest law is followed in Alabama, ALA. CODE ANN., tit. 36, § 95 (1940), but no case with a fact pattern similar to the one in the instant case is reported for that jurisdiction. No other state seems to have a guest statute with the limiting words under consideration in the Ohio law.

Massachusetts, without a statutory guest law but with a like judicial principle, supports the claim of the defendant that one may be a guest of the operator of an automobile while in the venture of the transportation although not in or upon the vehicle. *Bragdon v. Dinsmore*, 312 Mass. 628, 45 N.E. 2d 833 (1942); *Ruel v. Langelier*, 299 Mass. 240, 12 N.E. 2d 735 (1937). The California guest law, CALIF. VEHICLE CODE, § 403 (1948), has the limiting words "riding in any vehicle," and it has been held that a person, alighting from an automobile, with one foot on the ground and the other on the running board when the car moves, is not within the meaning of the act. *Prager v. Israel*, 15 Cal. 2d 89, 98 P. 2d 729 (1940).

An examination of the decisions reveals a sharp conflict as to when the guest statute attaches. Relief was given in an action for injuries received by a person as the result of the operator's closing the door. *Nemoitin v. Berger*, 111 Conn. 80, 149 Atl. 233 (1930). But it has been held that an invitee, injured before entering the automobile by the fall of the door in absence of the owner, is not covered by such statute. *Puckett v. Pailthorpe*, 207 Iowa 613, 223 N.W. 254 (1929). Plaintiff was not "riding" in the automobile within the meaning of the Iowa guest law while riding on a sled hooked to defendant's automobile. *Samuelson v. Sherrill*, 225 Iowa 421, 280 N.W. 596 (1938). But a person riding on a toboggan hitched to a bobsled attached to an automobile was being "transported" within the Michigan guest law. *Langford v. Rogers*, 278 Mich. 310, 270 N.W. 692 (1936).

The decided cases seem to indicate that, as a general proposition, an occupant of a motor vehicle is not a "guest" within the guest statute unless all the conditions set forth in the statute are

satisfied. It is submitted that the guest statutes should be construed so as to include such incidents of transportation as boarding and alighting from the vehicle.

Lowell B. Howard

TORTS—RIGHT TO PRIVACY

Following publication by the Curtis Publishing Co. of a satirical article concerning taxicab drivers of Washington, D. C., plaintiff taxicab driver brought an action against the publishing company for libel and for invasion of the right of privacy. The complaint was based on the article and its accompanying illustration, a photograph of a taxicab and of the plaintiff. The defendant moved to dismiss the complaint on grounds of insufficiency. *Held*, motion denied inasmuch as the plaintiff had presented a cause of action. *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (Dist. D.C. 1948)

The concept of the right of privacy as a legal right independent of any other was first propounded by Messrs. Brandeis and Warren who categorized it as a natural right. PROSSER, TORTS 1051. It has been defined as the right to be let alone, to be free from interference with one's private affairs and peace of mind. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W 2d 972 (1929). In its growth, this recent tort has acquired some characteristics of the defamation group. Consent results in forfeiture of the right. *Marek v. Zanol Products Co.*, 298 Mass. 1, 9 N.E. 2d 393 (1937). The right is strictly a personal one. *Mau v. Rio Grande Oil, Inc.*, 28 F Supp. 845 (N.D. Cal. 1939). Such an action cannot be brought by persons whose activities are of interest to the general public. *Elmhurst v. Pearson*, 153 F. 2d 467 (App. D.C. 1946); *Jones v. Herald Post Co., supra*. In its application, this rule is analagous to the principle of fair comment, an attempt by the courts to balance the public interest in freedom of speech and of the press with the interests of the individual. The action is, however, dissimilar to those of defamation in other respects. Truth is not a defense. *Themo v. New England Newspaper Co.*, 306 Mass. 54, 27 N.E. 2d 753 (1940). Publication is unnecessary. *Rhodes v. Graham*, 238 Ky. 225, 37 S.W. 2d 46 (1931). Malice is not a requisite, the motives of the invader being unimportant. *Sidis v. F-R Publishing Co.*, 113 F. 2d 806 (C.C.A. 2d 1940). Actual damages need not be shown. *Kunz v. Allen*, 102 Kans. 883, 172 Pac. 532 (1918).

In *Pavesich v. New England Mut. Life Ins. Co.*, 122 Ga. 190 (1905), the leading case on this subject, and also in *Peed v. Washington Times Co.*, 55 Wash. L. Rep. 182 (1927), relied upon in the opinion of the principal case, an unauthorized publication of a pho-

tograph was sufficient to allow recovery. It would seem, therefore, that the court correctly overruled the motion to dismiss.

In Ohio, the lower courts have on two occasions struggled with this new tort. In the first instance the court found it unnecessary to declare its position with respect to the existence of such a legal right, stating, apparently erroneously, that if there were such a right, there had been no intrusion. *Martin v. F. I. Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (C.P., 1938); Comment, 4 OHIO ST. L. J. 396 (1938). In the second case considered, the court expressly recognized the right as a natural one. *Friedman v. Hotel and Restaurant Employees Alliance*, 20 Ohio Op. 473, 6 Ohio Supp. 276 (C.P. 1941). It then granted a cause of action to a third party not the subject of the interference. As previously mentioned, this is contrary to the established rule that the right is purely personal. *Mau v. Rio Grande Oil, Inc., supra.*

The rapid growth of this doctrine and the advent of television as a possible accelerating factor seem to indicate that the Supreme Court of Ohio may shortly have to accept or reject the position taken by the lower court. Ohio, Michigan, and Oregon, following the common law principle, do not permit recovery for injury to the sensibilities alone, unless wilful. *Davis v Cleveland Ry. Co.*, 135 Ohio St. 401, 21 N.E. 2d (1939); *Wolfe v. Great Atlantic & Pacific Tea Co.*, 143 Ohio St. 643, 56 N.E. 2d 230 (1944); *Atkinson v. Doherty*, 121 Mich. 372, 80 N.W. 285 (1899); *Rostad v. Portland Light & Power Co.*, 101 Ore. 569, 201 Pac. 184 (1921). The basic concept of the right to privacy is that of freedom from mental distress and annoyance. Warren and Brandeis, *The Right to Privacy, supra.* The Supreme Court of Oregon concluded that the right was itself a legal one and that injury to the feelings was a concomitant; consequently, they allowed recovery. *Hinish v. Meir & Frank Co.*, 166 Ore. 482, 113 P 2d 438 (1941). Conversely, the Supreme Court of Michigan reasoned that the recognition of this right would be tantamount to allowing recovery for injury solely to the sensibilities, therefore they denied recovery. *Atkinson v. Doherty, supra.* Washington, Wisconsin, and Rhode Island have followed this Michigan decision. *Hellman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911); *Judevine v. Benzies-Montanye Co.*, 222 Wis. 512, 269 N.W. 295 (1936); *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909).

The majority of the jurisdictions considering the question have recognized the right, generally holding as did Oregon. PROSSER, TORTS 1052. New York, although not considering such a right to be inherent in the common law, has enacted a statute creating one when the wrong-doer is motivated by prospect of financial benefits through advertising or trade. *Binns v. Vitagraph Co. of America,*

210 N.Y. 51, 103 N.E. 1108 (1913). If it becomes necessary for it to rule on the question, apparently the better course for the Ohio Supreme Court to follow is that of the majority, inasmuch as the minority decisions have resulted from a reluctance to circumvent a common-law rule which has long been attacked as unreasonable and unjust.

J. Robert Donnelly

UNEMPLOYMENT COMPENSATION—AVAILABILITY FOR WORK

Claimant was employed by appellant company. His duties consisted of sweeping up steel filings and carting them away in a wheelbarrow. Upon the advice of his physician he quit the job, the work being too heavy for him, in view of his physical condition, and filed a claim for unemployment compensation. Claimant had previously done watchman and checking work for another employer. The Board of Review disallowed the claim, holding claimant was not available for work. The Common Pleas Court reversed the decision of the Board as manifestly against the weight of the evidence. The Court of Appeals affirmed the decision of the Common Pleas Court but certified the case to the Supreme Court on the ground that it was in conflict with a case decided by the Fourth Appellate District. *Stevens v. The Selby Shoe Co., not reported* (1945). *Held,* affirmed. The claimant was available for work and entitled to the benefits of the Unemployment Compensation Act. *Hinkle v. Lennox Furnace Co.,* 150 Ohio St. 471 (1948).

The Court of Appeals, Second District, had previously held that a claimant, in order to be deemed available for work, must be available for the work he had been doing at the termination of his employment. *Brown-Brockmeyer Co. v. Board,* 70 Ohio App. 370, 24 Ohio Ops. 228, 45 N.E. 2d 152 (1942), *motion to certify overruled* Oct. 21, 1942. At that time, by statute, no employee was entitled to benefits unless he was ". . . capable of and available for work." OHIO GEN. CODE 1345–6 (a) (1). In 1941 the pertinent portion was amended to read ". . . is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted." OHIO GEN. CODE 1345–6(a) (4). The Court of Appeals in the instant case held that the effect of the amendment was to establish two alternative tests of availability: (1) Available for work in his usual trade or occupation; or, (2) Available for work in any other trade or occupation for which claimant is reasonably fitted. The Supreme Court, impliedly adopting this view, held, in a per curiam opinion, that claimant, having previously done watchman and checking work, qualified under the second alternative.

The general purpose of the Unemployment Compensation Statutes is to alleviate the economic distresses resulting from involuntary unemployment. *Baker v. Powhatan Mining Co.*, 146 Ohio St. 600, 67 N.E. 2d 714 (1946); *W. T. Grant Co. v. Board of Review*, 129 N.J.L. 402, 29 A. 2d 858 (1943). Evidencing the fact that it was not designed as a health insurance is the availability requirement present in all the statutes. The test of availability is the claimant's attachment to the labor market. *Shorten v. Unemployment Compensation Commissioner*, 10 Conn. Supp. 186 (1941); *Bliley Electric Co. v. Unemployment Compensation Bd. of Review*, 158 Pa. Super. 548, 45 A. 2d 898 (1946); *In re Steinberg*, 262 App. Div. 921, 32 N.Y.S. 2d 197 (1942). Thus, those unable or unwilling to perform any type of work are obviously ineligible to receive benefits; as are those who limit their availability without good cause. *Haynes v. Unemployment Compensation Commission*, 353 Mo. 540, 183 S.W. 2d 77 (1944); *D'Yantone v. Unemployment Compensation Bd.*, 159 Pa. Super. 45, 46 A. 2d 525 (1946). The problem arises where the claimant restricts his availability with good cause, *Leonard v. Board*, 148 Ohio St. 419, 36 Ohio Ops. 60, 75 N.E. 2d 567 (1947); *Mills v. S. C. Unemployment Compensation Commission*, 204 S.C. 37, 28 S.E. 2d 535 (1944), or where the restriction, due to age or physical condition, is beyond his control, as in the instant case. *Fannon v. Federal Cartridge Corp.*, 219 Minn. 306, 18 N.W. 2d 249 (1945). See notes, 158 A.L.R. 404 (1945), 165 A.L.R. 1386 (1946).

The cases are in conflict as to when availability becomes so restricted as to disqualify a claimant but ". . . the general principle should be that an individual is able to work, despite his age and physical condition, if there is a market in the geographical area in which he is willing to work for services which he is able to perform." Freeman, *Able to Work and Available for Work*, 55 YALE L. J. 123, 129 (1945). The claimant in the instant case qualified under this standard and it would seem that the same result might have been reached in earlier Ohio decisions even in the absence of the amendment relied on by the court.

The opinion notes that the amendment requires reasonable fitness and mentions the fact that the claimant had previously demonstrated such fitness as a watchman and checker. In the *Brockmeyer* case, *supra*, it was said that fitness refers to training and experience. However, if the work which claimant is able and willing to perform requires little or no training, it would hardly seem logical that a lack of experience in such an occupation should disqualify him as not being "reasonably fitted."

The Court of Appeals in the *Selby* case, *supra*, admitted that the claimant had quit her last employment with good cause, but held

that since that employment was still available to her, she was disqualified by OHIO GEN. CODE 1345–6(a) (5) which requires that the claimant be unable to obtain work in his usual trade or occupation or any other trade or occupation for which he is reasonably fitted. This was also the reasoning adopted in the *Brockmeyer* case, *supra*. The failure of the Supreme Court to mention this restrictive interpretation in the principal case may properly be interpreted to imply future repudiation of a view which illogically required an applicant to accept a position which he had previously been justified in leaving on pain of loss of benefits.

William Machuga